Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VANCE NILSEN, *Petitioner*

v.

ROBERT BORG, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 6, 1995

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QUESTIONS PRESENTED

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WHETHER THE ACTIONS OF AN ATTORNEY WHO COUNSELS THE DEFENDANT TO COMMIT PERJURY, COMMITS THE DEFENDANT TO PERJURY IN OPENING STATEMENT, PREVENTS THE CLIENT FROM TESTIFYING TRUTHFULLY, AND THEN PROCURES THE DEFENDANT'S WAIVER OF THE RIGHT TO TESTIFY ON THE BASIS OF FALSE AND ERRONEOUS ADVICE, HAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

II

WHETHER THE DEFENDANT'S RIGHT TO TESTIFY AT TRIAL CAN BE WAIVED BY COUNSEL OVER THE OBJECTIONS OF THE DEFENDANT, AND WITHOUT A SHOWING ON THE RECORD THAT THE WAIVER WAS THE PRODUCT OF INFORMED CONSENT.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Vance Nilsen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the Appendix.

JURISDICTION

The Court of Appeals entered its judgment on Nov. 18, 1994. The jurisdiction of the Court is invoked under 28 U.S.C., § 1254(1). Jurisdiction below was invoked pursuant to 28 USC § 2253.

PROVISION OF LAW INVOLVED

The Sixth Amendment to the U.S. Constitution guarantees the accused the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984).

STATEMENT OF THE CASE

A. Proceedings Below.

In September of 1985, petitioner VANCE NILSEN (hereafter "petitioner") was convicted by jury trial in San Mateo County, State of California, of first degree murder with a finding of special circumstance that the murder involved the

infliction of torture. (Cal. Pen. Code, §§ 187, 189, 190.2(a)(18).) The sentence imposed was life without the possibility of parole. On direct appeal, petitioner's conviction was affirmed in all respects and a petition for review to the California Supreme Court was denied on June 23, 1988. Petitioner then discharged his attorneys and filed a pro-se petition for habeas corpus in which he alleged for the first time that his counsel at trial and on appeal had been ineffective. This petition was denied in the California courts, and review denied by the California Supreme Court on Nov. 2, 1989.

On April 25, 1990, petitioner retained new counsel to file a federal petition for habeas corpus pursuant to 28 USC § 2254. The petition was subsequently amended to focus on the present claim that petitioner's previous counsel had failed to obtain petitioner's informed consent to his failure to testify at the trial. Petitioner also requested an evidentiary hearing to test this claim, which had never received an evidentiary hearing in the state courts.

The California Attorney General answered the petition and filed supporting documents which included a declaration of trial counsel. Petitioner filed his own declarations and counter-declarations. On Aug. 5, 1993, the district court (Hon. Lowell

Jensen, Dist. Judge, N.D. Ca.) deemed the papers submitted by both sides to be cross-motions for summary judgment and set a hearing date for argument. However, petitioner's request for an evidentiary hearing was denied.

In a written order entered on Dec. 8, 1993, the district court dismissed the petition and reiterated its denial of the request for an evidentiary hearing. Petitioner filed a timely notice of appeal in the Ninth Circuit. On Nov. 18, 1994, the Court of Appeals, after ordering the matter submitted without oral argument, issued a memorandum opinion affirming the denial of the petition and concluding that the district court had not erred in summarily dismissing the petition and in failing to hold an evidentiary hearing.

B. Statement of Pertinent Facts.

Petitioner was convicted by a jury of the murder of Beth Trejo, who left her home on December 30, 1983, and never returned. (ER 1-6.) Her body was discovered in a rural section of San Mateo County on April 14, 1984, in a garment bag. The limbs of the decomposed body had been severed from the torso, which had a knife wound to the lower back through the vaginal canal. The prosecution's forensic pathologist testified at trial that in his opinion the knife and gunshot wounds were

inflicted in the living state, although he stated that the decomposition made it difficult to tell for sure. (ER 9-11.) The majority of the prosecution's case focused on overwhelming circumstantial evidence which linked petitioner over a long period of time to an intimate relationship with Trejo in general and to evidence which placed petitioner with Trejo on the night she disappeared. (ER 2-14.)

Around Easter time of 1985 – several months before the trial was scheduled to begin – petitioner confessed to trial counsel that he had in fact been with Beth Trejo on the night of her disappearance, and had been directly involved in her death. Petitioner stated that Beth Trejo had been soliciting help to commit suicide for some time. He had not attempted to kill or torture Trejo, but rather she had died as a result of placing a plastic bag over her head – which petitioner had assisted her in doing, in the hope that by playing along with Trejo's suicidal gesture, he could convince her that she really didn't want to die. Petitioner was in the act of mixing a drink, expecting her to come to her senses, when Trejo suddenly stopped breathing and died. At that point, angry at Trejo for having died (albeit without the intention of killing her), feeling his own life was ruined, and desensitized by alcohol and his shock at her

untimely death; petitioner had inflicted a knife wound and a gunshot wound on the remains; later, he had severed the limbs to dispose of the body. (CR 73; CR 65 [Exh. 1003].)

This account of petitioner's involvement in the death of Trejo was set out in a letter that petitioner wrote to Trejo's mother in February of 1992, while the petition for habeas corpus was pending. (ER 25.) The letter, a copy of which was sent by petitioner directly to the district court judge, provides, in pertinent part, the following details:

> That night, when again discussing Beth's suicidal desires, we began acting out a pseudo-suicide scene ... culminating in a plastic bag being placed over Beth's head and secured. At no time did I consider that Beth was actually going to go through with this ... I was hoping that Beth would come to her senses and realize she didn't really want to die.
>
> I became even more careless, and left Beth to go mix another drink, expecting Beth to come to her senses at any moment. The next thing I knew, Beth was dead before I could rip the plastic bag off her head.
>
> I immediately checked for a heartbeat and signs of breathing, but found none. I began to try to resuscitate her back to life for some length of time, to no avail, and was suddenly confronted with the horror that Beth was dead right before my eyes.
>
> At that point, I seemed to lose contact with reality. Already intoxicated to begin with, I found myself unable to cope with the death of Beth, and my inability to revive her.
>
> Some time later, feeling my world had ended, I inflicted two wounds on Beth. While I'm not sure why

I acted in such a manner at that time, it may have been due to my anger at her for dying on me, as I perceived it in the state I was in.

I want you to know I did not want Beth to die, and I wish she were with us now; but for your own sake I wanted you to know she died a painless death. In my desperation to save myself from the scandal of what happened to Beth, I made the further mistake of trying to cover it up... In order to remove Beth from the apartment without being detected, I went through the abhorrent act of dismemberment, while fighting off nausea. I can't tell you how difficult and repulsive this was for me, and I am so utterly ashamed of myself for all of my conduct....[1]

In a declaration submitted in the course of the proceedings in the district court, trial counsel admitted: "Some time in April of 1985, petitioner told me that he had been involved in the death of Beth Trejo. *He told me basically the same story that he now relates in his February 10, 1990 [sic.], letter to Mrs. Trejo.*" (CR 52 [Exh.S, p. 7].) Despite having been told all this by petitioner months before the trial started, counsel presented a defense of complete non-involvement. Defense counsel attempted to show at the trial that the decedent was not Trejo, whom counsel suggested might have still been alive (despite

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[1]The court received this letter and makes extensive reference to the it in its order of 8/5/93. (ER 25 et seq.) The letter was made part of the expanded record of the habeas corpus proceedings below, and petitioner's amended petition stated that the facts recited in the letter were true. (CR 43.)

a positive dental identification); that Trejo had consorted with other young people who might have killed her (though none were actually identified); and that petitioner had been working on December 30, 1993, and for months after that without acting unusual (though no alibi witnesses were produced). Because the defense was total innocence, no evidence was presented to suggest that petitioner was guilty of anything less than torture-murder, nor were any lesser-included instructions requested or given. (CR 52, 65, 73.)

Petitioner had told his attorney that he wanted to testify at the trial and, as related above, well before the trial had started, petitioner had confessed to trial counsel that he had been directly involved in Trejo's death (although without the intent to kill or torture her). (CR 65 [Exh.1003].) Nevertheless, counsel told the jury in opening statement that petitioner would testify that he was completely innocent and was not present or involved in any way in Trejo's death. (CR 65 [Exh.1007].)

Although petitioner and his attorney agreed on many things,[2] there is a sharp conflict between counsel and

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[2]For example, counsel admits that petitioner made a pretrial confession that admitted presence and involvement in decedent's death, that counsel nevertheless told the jury in opening statement that petitioner would testify to total non-involvement, that counsel

petitioner as to others, which was laid out in the declarations and counter-declarations filed in the district court, but which have never been the subject of an evidentiary hearing. Hence, presenting the partially controverted facts as advanced by petitioner below,[3] they demonstrate the following scenario:

When, before the trial, petitioner tearfully confessed his involvement in Trejo's suicide to counsel, petitioner insisted on telling the same thing to the jury and taking his chances on their verdict. Counsel initially agreed with petitioner that there was no choice but to "go with the truth at trial". However, counsel did not approach the district attorney to try and negotiate a plea bargain; rather, counsel decided to consult the San Francisco Medical Examiner (Dr. Boyd Stephens) to

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told petitioner it was "too late" to testify while the evidence phase was still in progress, and that counsel could not recall advising petitioner of any risks inherent in his not testifying prior to procuring petitioner's in-court "waiver" of the right to testify.

[3]Because the case was decided on summary judgment and without an evidentiary hearing, the facts presented by petitioner in opposition to the motion "must be taken as true" and examined in the "light most favorable to the party opposing the motion (i.e., petitioner here.) Ting v. U.S., 927 F.2d 1504, 1509 (9th Cir. 1991); Taylor v. List, 880 F.2d 1040, 1049 (9th Cir. 1989). The Ninth Circuit so recognized in its opinion. (Opn. below [see Appendix], at p. 5, ¶ 2.)

"verify" petitioner's confession. (CR 65 [Exh.1001, 1003] ; CR 73.)

Dr. Stephens did render an opinion that the knife wound and gunshot wound in the decomposed body were probably inflicted in the living state. Later, Dr. Stephens submitted to the District Court a declaration stating that "the decomposition of the body *make scientific statements less absolute and more subject to interpretation than would ordinarily be the case.*" (Exh. 2003.) However, Dr. Stephens had not been provided with petitioner's confession and therefore had only the prosecution evidence to go on. Moreover, Dr. Stephens was not asked at all by counsel whether the events recited by petitioner in his confession *could* have happened as petitioner had related, whether he could rule them out, or whether petitioner might have thought Trejo to be dead when in fact she was clinically alive. Nevertheless, based on Dr. Stephens' opinion with its inherent limitations, counsel told petitioner that the only possible defense was one of total innocence, and threatened petitioner that he'd be convicted of torture-murder unless he testified to a complete denial of any involvement in Trejo's death. In particular, just before the trial, Courshon and co-counsel Clifford Creton called a meeting to

inform petitioner that they were running the case and making all the decisions; that the defense was going to be total innocence, and that petitioner would be expected to testify to complete non-involvement; and that counsel was going to tell the jury at the start of the trial that petitioner would so testify, so that "there would be no turning back". Petitioner was intimidated, and believed that he had to alternative except go along with his counsel's instructions to testify contrary to his confession. (CR 65.) Counsel then did proceed to tell the jury in opening statement that petitioner would testify at trial and deny that he "in any way was involved in this incident". (CR 65 [Exh.1007] at p. 55.)

Despite the plan for petitioner to testify to total innocence, as the time approached for petitioner to testify at the trial, petitioner's conscience got the better of him and he decided he would not be able to get on the stand and lie about his non-involvement. Petitioner then told counsel that he just could not lie under oath. Counsel reacted by instructing petitioner not to testify at all, and gave numerous reasons to justify petitioner's refusal to testify; however, he did not warn at all about the grave dangers of petitioner *not* testifying – especially in a case in which petitioner was the only living eyewitness to

Trejo's death, and after counsel had promised the jury in his opening statement that petitioner would testify. On the basis of this one-sided advice, petitioner tentatively decided not to testify. However, after talking to the bailiff and sleeping on it, petitioner came in the next day and insisted on taking the stand and telling the truth as contained in his confession. Although the prosecution had not finished its rebuttal and the evidence had not been concluded, defense counsel represented that it was "too late" to testify. Just before the court began instructing the jury, counsel abruptly instructed petitioner to state for the record that he had elected not to testify, and petitioner then told the judge that he had decided not to take the stand "due to the proceedings". (CR 65, 75.) According to petitioner, the "proceedings" included counsel's attempt to suborn perjury and his refusal to allow petitioner to testify truthfully.

As a result, the jury never heard petitioner's confession, and there was no evidence introduced to support a verdict other than complete innocence or torture-murder in the first degree. The jury then returned the latter verdicts, and petitioner was sentenced to life without the possibility of parole. (ER 1-20.)

C. The rationale of the Ninth Circuit decision.

In affirming the summary denial of the petition and the district court's refusal to grant an evidentiary hearing, the Ninth Circuit reasoned as follows:

1. Petitioner's claim that his counsel rendered deficient performance by failing to obtain his informed consent to waiving his right to testify is "significantly undermined by the fact that Nilsen himself expressly waived this right at trial." (Court of Appeals Opinion below [hereafter "Opn."], p. 4, ¶ 2.)

2. Even disregarding petitioner's express waiver, the right to testify is a "strategic trial decision with constitutional dimensions". (Opn., p. 4, ¶ 3.) This kind of right is to be distinguished from "personal rights that a defendant must waive explicitly, such as the right to go to trial or plead guilty or to be represented by counsel ..." (Id.)

3. Viewed "in this light" (see #2, supra), defense counsel's decision at trial and on appeal not to have petitioner testify "was not incompetent", based on the tactical considerations advanced by trial counsel and adopted by the District Court. (Opn., p. 5, ¶ 1.)

4. Even if petitioner stated a viable claim of counsel's

deficiency, and considering the evidence favorable to Nilsen, it is "still clear that a jury, faced with substantial evidence contradicting Nilsen's claim, would have found Nilsen's testimony 'implausible' ". Hence, counsel's "refusal to allow Nilsen to testify" does not establish prejudice according to the Strickland test. (Opn., p.5, ¶ 2 [citing Strickland, supra, at 2068].) For the same reason, petitioner has failed to demonstrate genuine issues of material fact that are sufficient to preclude summary judgment. (Opn., p.6, ¶ 1.)

5. The district court did not err in failing to hold an evidentiary hearing on this issue, because even accepting Nilsen's factual allegations as true, he is nevertheless incapable of demonstrating "prejudice", which is a requirement for a showing of ineffective assistance of counsel. (Opn., §III.)

REASONS FOR GRANTING THE PETITION

Reason #1:

The Ninth Circuit decision relies on questionable authority and directly conflicts with the law in several other circuits, which requires that the right to testify be knowingly, voluntarily, and intelligently waived by the defendant himself, and that defendant's informed consent to any such waiver appear on the record.

The sole issue before the Ninth Circuit was whether petitioner's counsel had failed to obtain petitioner's informed

consent to his waiver of the right to testify, and – if so – whether this amounted to ineffectiveness of counsel. The Ninth Circuit purported to resolve this issue by finding that the right to testify can be waived by counsel, and that there were legitimate tactical considerations which supported the attorney's waiver of the right. Therefore, the Ninth Circuit did not deem it necessary to decide whether petitioner's on-the-record "waiver" of the right at trial was knowing and intelligent – as opposed to the product of his attorney's unethical, erroneous, and insufficient advice.

This Court has consistently held that, where a right is a "fundamental", it can only be waived personally by the defendant, which necessarily requires that the waiver be "knowing and intelligent", Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938), and that the defendant's personal, knowing, and intelligent waiver of the right appear "on the record". Conley v. Cochran, 369 U.S. 506, 516 (1962). See also Boykin v. Alabama, 395 U.S. 238, 242 (1969) and Barker v. Wingo, 407 U.S. 512, 529 (1972) [knowing and intelligent waiver of personal rights must appear on the record].)

All that appears on the trial record in the instant case is defendant's naked statement to the court at one point that he

was waiving the right to testify "due to the proceedings" - which "proceedings" included counsel's attempt to suborn perjury. There is no inquiry by the court or counsel as to as to whether petitioner knew he had the right to testify even if his counsel disagreed with the assertion of the right for tactical reasons, or whether counsel had fully advised petitioner of the pros and cons involved in waiving the right to testify in a case where defendant was the only living eye-witness to what had actually happened to the decedent. On the contrary, the declarations of petitioner before the district court established that he waived the precious right to testify only because he was pressured by his lawyer to do so without any explanation of the negative implications of doing so, and upon the completely erroneous advice that it was "too late to testify", even thought the evidence phase of the case was still in progress. In short, there is no showing on the record here of the knowing and intelligent waiver of the fundamental and personal right of the defendant to testify

Central to the Ninth Circuit's summary rejection of petitioner's claim that his constitutional right to testify was denied by ineffectiveness of counsel is its finding that the right to testify is a "strategic trial decision with constitutional

dimensions", which is to be "distinguished from ... personal rights that a defendant must waive explicitly, such as the right to go to trial or plead guilty or to be represented by counsel ..." (Opn., pp. 4-5.) In other words, the Ninth Circuit finds that the right to testify is a fundamental and personal right, but yet simultaneously allows that fundamental, personal right to be waived either by counsel, by the failure of the defendant to interrupt the proceedings to vocally demand the right, or by a "waiver" which lacks any indication that it is knowing, voluntary, and intelligent.

This paradoxical but critical finding by the Ninth Circuit – that the right to testify is fundamental and personal, yet can be waived without the requirement of a showing of informed consent that is required for the waiver of all other fundamental and personal rights of the accused – is the product of a controversial history in the Ninth Circuit itself, and is directly contradicted by the law in numerous other circuit courts.

Law in the Ninth Circuit: The Checkered History of U.S. v. Martinez

The issue of the right to testify and how it can be effectively waived was addressed as a "question of constitutional law new in this circuit" in the case of U.S. v.

Martinez, 883 F.2d 750 (9th Cir. 1989). Martinez was the product of a split decision, including an extensive and thoughtful dissenting opinion by Justice Reinhardt. The majority opinion, also extensive in its own right (11 pages long in the official reports vs. 14 pages for the dissent) recognized that the right to testify is a fundamental right belonging to the defendant, and that "as the right is fundamental and personal it can only be relinquished by the person to whom it belongs, the defendant in a criminal trial". The majority also acknowledged that "the general rule is clear that the relinquishment of such a right must be intentional and to be intentional must be known to the one who gives it up. (Martinez, supra, at p. 756.) Furthermore, the majority recognized that counsel bore the responsibility to "advise a defendant on whether or not to testify, and the tactical advantages and disadvantages of each choice". (Id., at 757.) Nevertheless, the majority indulged a "presumption of waiver" of the right from conduct which amounted to "acquiescence at the trial in the attorney's advice"; consequently, "conduct, without proof of knowledge of the constitutional right, was enough." (Ibid.) Accordingly, even though the majority had found the right to testify to be fundamental and personal to the

defendant, the court allowed a waiver of the right to occur without any showing on the record that the defendant had knowingly and intentionally waived the right.

The dissent by Justice Reinhardt forcefully argued that, if the right was indeed fundamental and personal, decisions of this Court required that a waiver of the right be accompanied by a waiver of the right that was shown *on the record* to be *knowing and intelligent.* (Martinez, supra, at p. 769 [Reinhardt, J., dissenting, citing Boykin v. Alabama, 395 U.S. 238 (1969), and several other decision of this Court] ["The record must reflect that the defendant possess the knowledge and understanding necessary to make an informed decision".] The dissent also pointed out that the majority had effectively required the defendant to speak out on his own in open court against his attorney's instructions, even though "defendants are trained to be seen but not heard", and "criminal defendants who speak without invitation are not only silenced but threatened with the judicial contempt power". (Id., at 770.) Concluding by reminding that "The Supreme Court has instructed us to comb each case carefully for evidence of the defendant's *informed consent* " (id., at 773 [emphasis added]), the dissent concluded that the right to testify could not be

waived by counsel and could not be presumed from a silent record which failed to reflect a waiver which was the product of informed consent.

Within a short time after Martinez appeared in the official reports, at least two circuit courts declined to follow it, criticizing the majority opinion on the same bases as those contained in Justice Reinhardt's dissent. See U.S. v. Teague, 908 F.2d 752 (11th Cir. 1990); and Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991). While this controversy brewed, Martinez itself was vacated on April 9, 1991, because it was reversed on other grounds. (U.S. v. Martinez (II), 928 F.2d 1470 (9th Cir. 1991). Before it was withdrawn, however, another 9th Circuit panel relied on the reasoning of the Martinez majority to find a waiver of the right to testify where the defendant's counsel had waived the right over the silent objection of the defendant. (U.S. v. Edwards, 897 F.2d 445, 446-47 (9th Cir. 1990). However, the Edwards decision was only 3 pages long and made no mention whatsoever of the arguments raised at length by the extensive majority and dissenting opinions in Martinez. The right-to-testify issue then arose next in the Ninth Circuit in U.S. v. Nohara, 3 F.3d 1239 (9th Cir. 1993). Nestled with four other issues, the argument that defendant had

"waived his right to testify by remaining silent at his trial" was summarily held to be "precluded" by Edwards. The entire Nohara discussion of this important issue was relegated to two short paragraphs, and it ignored Martinez entirely.

Finally, the issue arose again in U.S. v. Joelson, 7 F.3d 174 (9th Cir. 1993), where the defendant's attorney refused to allow him to testify despite defendant's on-the-record request to do so, withdrawn shortly thereafter following a discussion with the court and counsel. Although describing the court's taking of the waiver as "troubling" and "inadvisable", the Joelson court nevertheless found the situation "not so egregious that Joelson's ability to knowingly and intentionally waive his right to testify was impaired". (Id., at p. 178.) Accordingly, even though the court acknowledged that the right to testify was fundamental and personal, and could be "relinquished only by the defendant", and that the defendant's waiver of the right must be "knowing and intentional", the court found the right to testify to be "essentially ... a strategic trial decision with constitutional implications", and therefore one that could be waived by counsel without any inquiry on the record into whether the defendant also was waiving the right and was doing so based on informed consent. In reaching its

decision, Nohara resurrected the reasoning of the Martinez majority but ignored entirely the dissenting opinion and the rapidly growing number of circuit courts that had rejected the rationale of the Martinez majority in favor of the arguments presented in the dissent. (Id., at p. 178.)

Against this tortured background, the instant case reached the Court of Appeals below, which slavishly adopted the Joelson reasoning to hold that petitioner's informed consent was not required to waive the right to testify – even though the record lacked any showing of defendant's informed consent to the waiver, even though the habeas record clearly reflected that petitioner had not been advised of any of the enormous risks of failing to testify, and even though the in-court " 'waiver' due to the proceedings" was made because petitioner refused to testify falsely, and followed the erroneous advice of counsel that it was "too late" to testify when the evidence phase of the case had not been concluded.

As demonstrated above, the Ninth Circuit's core holding that the right to testify, although "fundamental and personal", can nevertheless be waived by counsel and/or by conduct of the defendant falling far short of a knowing and intelligent, on-the-record waiver, has an extremely questionable history in

the Ninth Circuit itself. As shown below, the Ninth Circuit holding in this regard has been either soundly rejected or called into serious doubt by several other circuits.

a. Eleventh Circuit

The Eleventh Circuit has squarely held that the right to testify cannot be waived by counsel unless the record clearly reflects that the defendant's waiver was based on informed consent and a knowing understanding that he could exercise the right over counsel's tactical objections. In its initial decision in United States v. Teague, 908 F.2d 752 (11th Cir. 1990) [hereafter "Teague I"], the Eleventh Circuit noted that the court below had held that defendant had failed to proved that he had not acquiesced in his attorney's decision to rest without calling the defendant to the stand, and that this rationale "was recently adopted by the Ninth Circuit in ... Martinez. Teague I, supra, 908 F.2d at 759. Nevertheless, the Teague court declined to follow Martinez, and held instead that "the absence of an on the record objection by the defendant himself is of little, if any, probative value in determining whether the decision that the defendant would not testify was the defendant's own decision." Ibid. On this basis, the court reversed and remanded the case for a new trial.

Teague I was subsequently reviewed en banc. U.S. v. Teague, 953 F.2d 1525 (11th Cir. 1992). On rehearing, the court affirmed the defendant's conviction on the basis that the evidentiary hearing in the district court had supported the finding that defendant had, in fact, knowledgeably acquiesced in his counsel's decision to waive defendant's right to testify. Nevertheless, the en banc decision fully reaffirmed the rationale of Teague I, holding that " a criminal defendant has a fundamental right to testify on his own behalf, that this right is personal to the defendant, and that *the right cannot be waived by defense counsel.*" (Id., at 1535 [emphasis added].) Relying on decisions by this Court, the Eighth Circuit reasoned that the personal right to testify is one of the fundamental rights that are "essential to due process of law in a fair adversary process", and is, indeed "even more fundamental to a personal defense than the right of self-representation". Id. [citing Rock v. Arkansas,[4] 483 U.S. 44, 53 (1987) [recognizing

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[4]There has been some debate in the district courts as to whether the right to testify announced by this Court in 1987 in Rock v. Arkansas, supra, 483 U.S. 44 amounts to a "new" rule within the rubric of Teague v. Lane, 489 U.S. 288 (1989). Compare DeLuca v. Lord, 858 F.Supp. 1330, 1356 (S.D.N.Y. 1994) [not a new rule because grounded in prior law] with Dowell v. C.M. Lensing, 805 F.Supp. 1335, 1360 (M.D.La. 1992) [opposite conclusion]. We submit that the right to testify is not "new" in the sense of Teague v. Lane:

the right to testify as fundamental] and Faretta v. California, 422 U.S. 806, 819 n. 15 (1987) [recognizing the right to self-representation as a right personal to the defendant].

In finding that the right to testify was fundamental and personal to the defendant, the court in Teague II held that "defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, *the strategic implications of each choice, and that it is ultimately for the defendant himself to decide.*" (U.S. v. Teague, supra, at 1533 [emphasis added].) The court therefore equated the right to testify with other personal rights such as the right to plead guilty and proceed to trial, and found that this equation was entirely consistent with the Model Rules of Professional Conduct [rule 1.2 & comment] and the A.B.A. Standards for Criminal Justice [Standard 4-5.2(a)]. Further, the court held that, where counsel deprives a defendant of the ability to choose whether or not to testify on his own behalf or refuses to accept defendant's decision to testify, counsel acts

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however, that question need not be resolved here, since the underlying conviction of petitioner was not affirmed by the California Supreme Court until June 23, 1988, more than a year after Rock was decided, and it was only thereafter that petitioner first raised ineffectiveness of counsel after his trial and appellate counsel had neglected to raise the issue on direct appeal.

"unethically" and "would have neglected the vital responsibility of insuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary". (Teague, supra, at 1534.) Of course, these are precisely the claims that petitioner is making here, but which were rejected by the Ninth Circuit by subordinating defendant's right to testify and to knowingly and intelligently waive that right to counsel's tactical choices.

The Teague II holding that the right to testify is personal to the defendant and can only be waived by the defendant in a knowing and intelligent fashion has been faithfully followed by subsequent decisions in the Eighth Circuit. See, e.g., U.S. v. Camacho, 40 F.3d 349 (11th Cir. 1994) [counsel's performance is "deemed deficient" if counsel refused to accept defendant's decision regarding testifying]; and by district court decisions in the wake of Teague, e.g., U.S. v. Palma-Rodriguez, 819 F.Supp. 1064, 1065 (M.D.Fla. 1993) [right to testify cannot be waived by counsel; record must show that defendant was fully aware that right to testify was his and could be exercised over the objections of counsel].

b. Eighth Circuit

The Eighth Circuit also rejects the Ninth Circuit position

relied on to deny petitioner's claim here, and squarely holds that the defendant's right to testify cannot be waived by counsel without the defendant's informed consent.

In Foster v. Delo, 11 F.3d 1451 (8th Cir. 1993), the court adopted the Teague rationale held that the right to testify can only be waived by the defendant himself, not solely by counsel, and that a defendant is denied his Sixth Amendment rights where his counsel waives the right "without first obtaining his *informed consent* ". (Id., at p. 1454 [emphasis added].) In Foster, the court granted the portion of a habeas corpus petition in which petitioner argued that he was "misled by his counsel", who had waived petitioner's right without assuring that the waiver was the product of "an *informed* decision whether to waive". Id., at p. 1457. Furthermore, even though the crime involved was particularly "heinous", the court found that petitioner was prejudiced in Strickland terms because, had he testified, there was a "reasonable probability that the jury would have fixed the penalty at less than death". (Id., at 1458.) Consequently, the court granted the habeas corpus petition on the basis of ineffectiveness of counsel.

Petitioner's claims here are indistinguishable from those in Foster: As in Foster, petitioner claims that his waiver of the

right to testify was not the product of "informed consent"; and that, had he been able to testify, he would have at least had a reasonable chance of convincing the jury to impose a penalty short of life-without-parole.

c. Seventh Circuit

The Seventh Circuit expressly refused to follow the Martinez rule that the defendant must protest his lawyer's waiver of the right to testify, "recognizing that the defendant might well feel too intimidated to speak out of turn in this fashion." Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991). Consequently, recent decisions in the Seventh Circuit have squarely held, contrary to the Ninth Circuit, that "a defendant's right to testify is a personal right *which is not waivable by defense counsel for tactical reasons* absent the defendant's consent". U.S. v. Muehlbauer, 892 F.2d 664 (7th Cir. 1990) [emphasis added]. As for the defendant's consent, it must be "knowingly and voluntarily" obtained. (Ibid.) If the basis for a waiver of the right to testify is counsel's advice, such a waiver must be "based on reasonable advice given".

Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990). [5]

d. Fifth Circuit

The Fifth Circuit expressly adopts the Teague rule that the right to testify "cannot be waived by ... defense counsel", thereby implicitly rejecting the Martinez rule to the contrary in the Ninth Circuit. Jordan v. Hargett, 34 F.3d 310, 312 (5th Cir. 1994). If the right to testify is to be waived, the court must be satisfied that "defendant made a knowing, voluntary, and intelligent waiver of his right to testify. (Ibid [relying on Teague].)

e. First Circuit

Although we have not located a First Circuit decision accepting or rejecting the Ninth Circuit approach below, a Maine district court has recently adopted the contrary rationale of the 11th and Eighth Circuits discussed above.

In Wogan v. U.S., 846 F.Supp. 135 (D.Me.1994), the court held that an attorney had failed to render effective assistance by failing to advise defendant of the "downside

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[5] We submit that advice by an attorney that neglects to contain any warnings of the risks of not testifying, or which erroneously states that it is "too late" to testify before the evidence has been concluded cannot possibly be "reasonable" advice as required by the 7th Circuit.

risks" of not testifying. In so doing, the court rejected counsel's purported "strategic reason" for advising the defendant not to testify, finding that counsel "also had a primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." (Id., at 140 [relying on Teague, supra, and Foster v. Delo, supra.) The court went on to find that this balanced and complete advice by counsel "was critical because a defendant cannot be found to have relinquished a constitutional right unless the waiver is made intelligently, voluntarily, and knowingly." Wogan v. U.S., supra, at p.140. Speaking directly to the issue of effectiveness of counsel in the context of advising defendant regarding his right to testify, the court stated (at p. 142), in language particularly pertinent here:

> Where defendants have clearly acceded to counsel's advice but counsel was later found to have misinformed defendants with respect to the consequences of taking the stand, courts have found ineffective assistance of counsel. [¶] ... The court finds that Petitioner was not provided with an adequate basis for making a meaningful and voluntary waiver of his right to testify. The case law indicates that counsel had a clearly defined duty to inform [petitioner] of the benefits [of not testifying] to be weighed against the risk of not taking the stand ... *By not informing [petitioner] of the negative consequences that might accompany a decision not to testify, Counsel misrepresented the realities of his case and failed to properly protect [petitioner]'s exercise of a fundamental*

constitutional right.

Wogan, supra, at pp. 142-143 [emphasis added].

Decisions such as Wogan cannot possibly be squared with the Ninth Circuit rationale that precludes petitioner from questioning, even at an evidentiary hearing, whether the waiver of the right to testify was the product of informed consent or rather resulted from counsel's neglect or purposeful failure to inform petitioner of the major downside risks of not testifying.

f. Third Circuit

In an early case, the Third Circuit held that "a criminal defendant's right to testify in his own defense is of such fundamental importance" that a defendant could insist on testifying over his attorney's contrary advice. U.S. ex rel Wilcox v. Johnson, 555 F.2d 115, 119-20 (3d Cir. 1978).

A recent district court decision emanating from the Third Circuit has expressly disapproved of the majority rule in Martinez, stating: "To the extent that the majority in Martinez is to be understood as holding that a defense attorney's decision not to call the defendant to the stand conclusively establishes the client-waiver, I disagree for the reasons developed at length by Judge Reinhardt in his careful dissenting opinion."

United States v. DiSalvo, 726 F.Supp. 596 (E.D. Pa. 1989).

Recent district court decisions in the Third Circuit have continued to depart from the Ninth Circuit approach, one case holding that an evidentiary hearing is required where the a defendant claims that counsel has abridged his right to testify, U.S. v. Moskovits, 815 F.Supp. 147, 153 (E.D.Pa. 1993); and another that "a defendant's waiver of his right to testify, like any other constitutional right, must be made voluntarily and knowingly." U.S. v. Robles, 814 F.Supp. 1233, 1242 (1993) [citing U.S. v. Bernloeher, 833 F.2d 749, 751 (8th Cir. 1987)]. The Robles court expressly approved of DiSalvo's approach (i.e., declining to follow Martinez) by stating that a purported waiver of the right to testify is "involuntary or unknowing if the attorney flagrantly disregarded the defendant's wish to testify". Robles, supra, at p. 1242.

The latter is precisely the claim made by petitioner here but summarily rejected by the Ninth Circuit.

g. Second Circuit

The Second Circuit is in the process of departing entirely from the Martinez approach.

In U.S. v. Vargas, 920 F.2d 167 (2nd Cir. 1990), the court was faced with a claim that counsel had erroneously advised

the defendant not to testify. The result of the case was to determine that counsel's advice was not unreasonable, based on a failure by the defendant to flesh out his claims of counsel error with any specifics in his affidavit. Nevertheless, the court was constrained to "express our substantial doubt" about the correctness of the government position in the case, which was expressly based on the Martinez approach to waiver. The court criticized Martinez's rule that waiver of the right to testify can be made out by a "failure to protest", and stated (at 170) :

> We also note the existence of recent authority rejecting the government's position. [Citing Teague I.] The issue does not seem to be an easy one. See, e.g., the majority and dissenting opinions in Unites States v. Martinez [cite].

In 1994 the Second Circuit further distanced itself from Martinez, expressly adopting the contrary holding from the 7th Circuit that "the defendant need not protest ..." U.S. v. Castillo, 14 F.3d 802, 805. (2nd Cir. 1994).

The steady trend away from Martinez continued with the District Court decision in DeLuca v. Lord, 858 F.Supp. 1330 (S.D.N.Y. 1994) where the court rejected outright the concept that the right to testify may be waived by counsel or by conduct, stating "this model seems to ignore the requirement that waiver of a fundamental right must be both knowing and

voluntary. *Clearly a defendant who is unaware that [he] has a right to assert [his] desire to testify over [his] attorney's wishes cannot be deemed to have waived [his] right knowingly and voluntarily.*" (Id., at p. 1356 [emphasis added].)

Finally, in language particularly pertinent here, the court rejected arguments subordinating the right to testify to counsel's tactical choices:

> After all ... a defendant cannot knowingly and voluntarily waive her right to testify if [he] is unaware that it is [his] decision to make ... The right to testify is a basic right, and there is an obligation on the part of both the Court and trial counsel to inform the accused of his right to testify, if he so desires. Further it is the duty of both to assure that the exercise of this basic right by the accused is a free and meaningful decision. *The right to testify is personal to the accused. He must make the ultimate decision on whether or not to take the stand.* In this regard it is unlike other decisions, which are often called "trial decisions", where it is counsel who decides whether to cross-examine a particular document. Here it is the accused who must decide and *it is the duty of counsel to present to him the relevant information on which he may make an intelligent decision.* [Citation to Poe v. United States, 233 F.Supp. 173 (D.D.C.1964)] [emphasis by the DeLuca court] ....
>
> [¶] Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life.
>
> *Thus, this Court finds that defense has the crucial responsibility of protecting his client's fundamental right to testify and assuring that any waiver of that right is both knowing and voluntary. Consequently, if counsel has failed to inform the defendant that the ultimate right to decide whether or*

not to testify belongs to the defendant, and the preponderance of credible evidence indicates that the defendant was not independently aware of this right, then counsel has rendered ineffective assistance to his client.

DeLuca v. Lord, supra, 858 F.Supp. at pp. 1359-1360 [emphasis added].

Summary

The courts in no less than seven of the circuits have departed from the Martinez rule allowing for a defendant to waive his right to testify either through the actions of his attorney or inaction by the defendant himself, even though there is no on-the-record showing of a voluntary, knowing and intelligent waiver.

If the Martinez rule is erroneous – and these seven circuits have suggested that it is – that invalidates rationales 1, 2, and 3 of the Ninth Circuit opinion below. (See § C, supra.) Absent those underpinnings, the Ninth Circuit's opinion below must stand or fall on the remaining rationales, which depend upon the conclusion that petitioner "suffered no prejudice" from not testifying in his own behalf. However, the entire "prejudice" analysis adopted by the Ninth Circuit is based upon a weighing of the strategic reasons given by counsel for his failure to honor the defendant's right to testify, and a finding

that these tactical choices were "not incompetent". (Opn. at p. 4, ¶ 1.) As the cases above demonstrate, if the right to testify is fundamental and personal and if that right is denied by actions of counsel, such a denial of a fundamental and personal right can never be justified on the basis of tactical choices, no matter how "reasonable" they might be deemed in hindsight. See, e.g., U.S. v. Butts, 630 F.Supp. 1145, 1148 (D.Me. 1986) [right to testify is "so basic to fair trial that its infraction can never be treated as harmless error, which is in essence the inquiry required to be made by the second, prejudice to the defense, prong of Strickland]. See also DeLuca v. Lord, supra, 858 F.Supp. 1330, at 1361 ["The testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."]

Moreover, where the defendant does not testify because of the actions of counsel which violate the Sixth Amendment, there is an inherent gap in the appellate record which cannot be remedied by the ordinary harmless-error analysis, since the testimony itself is "missing" from the record. The dissent in Martinez points out (Martinez, supra, 883 F.2d at 769) the

practical difficulty of applying a harmless-error analysis in these circumstances consistently with prior decisions of this Court:

> Barring the accused from the stand results in guesswork about the impact of the missing testimony – testimony which, in many cases, forms the centerpiece of the modern trial. An appellate court cannot accurately determine from the cold record what impact the defendant's statements would have had on the judgments of the jury ... [H]armless error analysis, designed to insure correct outcomes, is essentially irrelevant to a panoply of constitutional rights that protect individual dignity. See Flanagan v. U.S., 465 U.S. 259, 268 (1984); Payne v. Arkansas, 356 U.S. 560, 568 (1978). Since the right to testify serves the principles of dignity and individual choice, the rule of Chapman is inapplicable to the error in this case. Indeed, even were a court inclined to apply harmless error analysis, Supreme Court precedent would bar such an approach: The appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." Luce v. U.S., 469 U.S. 38, 42 (1984).

Finally, even if a decision that violates a defendant's fundamental, personal constitutional rights could somehow be saved by finding the error "non-prejudicial", because the present case came up on summary judgment without any evidentiary hearing, the reviewing court had to consider the evidence "in a light favorable to Nilsen", something the Ninth Circuit itself concedes. (Opn. at p. 4, ¶ 2.) Considering the evidence in this light, the forensic evidence did not rule out the facts contained in the declarations containing petitioner's proposed testimony, and Dr. Stephens emphasied that the

scientific determination as to when the wounds were inflicted – before or after death – was severely hindered by decomposition of the body. Hence, and given that petitioner never even had an evidentiary hearing on his allegations, the conclusion of the court that a jury would have necessarily "found petitioner's testimony implausible" cannot be sustained. Also, because no witnesses other than petitioner gave any evidentiary support to a defense theory other than complete innocence (a theory disproved by petitioner's pretrial confession to his attorney) petitioner was necessarily deprived of the opportunity to present the jury with *any* alternatives to a finding of torture-murder and a resulting sentence of life-without-parole. As we summarized in our Opening Brief on appeal (at pp. 28-29), this is "prejudice" in Strickland terms :

> In sum, none of the reasons given by the court as reasons for petitioner to have declined to testify hold water on critical examination, and therefore none of them supports the court's determination that petitioner's failure to testify was not prejudicial. Moreover, there are numerous, substantial factors on the other side of the scale, which suggest that petitioner's failure to testify was highly prejudicial. For example: (1) Counsel's failure to put petitioner on the stand to testify to his confession resulted in a complete lack of evidence to support any lesser-included offense instructions; (2) Even though petitioner had no prior criminal record, the jury never heard petitioner deny that he had done the horrible things the prosecution alleged; (3) Without petitioner testifying there

were no eyewitnesses to shed any doubt on the prosecution's theory that petitioner had tortured and killed Trejo because he was a demented sexual sadist; (4) Instead of having petitioner admit to his relationship with Trejo and his being with her on the night she died (facts which were proved anyway via phone records and other uncontroverted circumstantial evidence), counsel lost any credibility with the jury by trying to prove that the decedent was not Beth Trejo in the face of a positive dental identification; (5) Because counsel did not present a defense based on petitioner's testimony of limited involvement, counsel did not call an expert psychiatrist to explain how petitioner might have acted as he did as a result of intoxication and shock in the wake of Trejo's sudden, unintended death; (6) By claiming that petitioner was not with Trejo when she died, counsel opened the door to the highly prejudicial Joanne Nilsen dry-firing-in-the-vagina incident being admitted to prove identity; (7) Petitioner never testified about – and counsel never introduced – powerful evidence of Trejo's suicidal ideation which would have corroborated essential portions of petitioner's confession.

Under these circumstances, it is hard to imagine any *more* "prejudice" that could have flowed from the inadequacy of counsel in causing petitioner to refrain from testifying in this case. Thus, the "prejudice" prong of Strickland is more than amply satisfied on this record.

Summarizing, absent the Martinez rationale – which does not require "informed consent" for the waiver of a right nevertheless deemed to be a fundamental and personal constitutional right – the reasoning of the Ninth Circuit in this matter is eviscerated, and the decision has no rational basis. The tortured history of Martinez in the Ninth Circuit itself is questionable enough – the fact that at least seven other circuits have departed from the rule is the most powerful

evidence that the approach of the Martinez majority and its cursory adoption by subsequent Ninth Circuit panels is wrong, and must be reviewed by this Court by granting the petition certiorari in this matter.

Reason #2.

The decision of the Ninth Circuit insulates unethical and unconstitutional attorney conduct from review and thereby severely damages the integrity of the justice system.

As a result of the summary dismissal of petitioner's claims in this case without an evidentiary hearing, the attorney in this matter has been immunized from any scrutiny into petitioner's allegations of highly unethical conduct, which petitioner has not even been permitted to develop on the record in an evidentiary hearing. Petitioner's claims in this regard – all of which are amply supported by the record below, include the following:

a. Petitioner's attorney advocated an affirmative strategy of deceit after hearing his client's pre-trial confession.

Petitioner confessed to his attorney before the trial that he had been present and had been responsible to some degree for decedent's death. (Even defense counsel admits this.) Nevertheless, counsel persuaded petitioner to testify to complete non-involvement and put on an alibi defense, which

counsel knew to be directly contrary to petitioner's confession. Furthermore, counsel actually told the jury in opening statement that petitioner would take the stand and would say that he was not at the scene! Hence, counsel went far beyond taking a posture of exploiting "reasonable doubt' in the prosecution's case and crossed the line into telling the jury that his client would testify to a story that was completely belied by petitioner's pretrial confession to his lawyer. This Court has held in a landmark decision that counsel does not have the obligation *or* the right to put the defendant on the stand to testify to a story that counsel knows is false. Nix v. Whiteside, 475 U.S. 157, 175 (1986). Furthermore, ethical rules prohibit an attorney from assisting a client to commit perjury [Model Code of Prof. Resp., Rule 3.3(a)(2)] and impose instead a duty to "strongly discourage the defendant against taking the witness stand to testify perjuriously". ABA Project, the Defense Function, Standard 4-7.7(a).

In contravention of law and ethics, counsel here heard petitioner's pretrial confession of limited involvement in decedent's death, but nevertheless put on a defense based entirely on alibi and upon attacks on the identity of the deceased and the identity of petitioner as the person with her

when she died. By calling witnesses and indulging in cross-examination tailored to disprove facts that petitioner himself had admitted in his pre-trial confession, counsel violated the law and the ethics of the profession, and forever tainted the integrity of the judicial tribunal that would have to pass judgment on petitioner.

b. Counsel advised his client to commit perjury.

"... As an officer of the court, an attorney is prohibited from knowingly presenting false testimony ..." Comment, Proposed Client Perjury: A Criminal Defense Attorney's Alternatives, 12 Balt.L.Rev. 248, 249 (1983); McCarthy & Mejia, The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and A Hard Place, 75 J.Crim.Law & Criminology 1197, 1121 (1984) [" '*The lawyer should seek as powerfully and persuasively as possible to dissuade the client from taking the stand to perjure himself* [citations].' Everyone agrees with this approach and it invades no constitutional right, and it makes sense."] [emphasis added]; see generally Nix v. Whiteside, supra.

When the defendant confessed to counsel that he had been involved in the death of the decedent, counsel could have chosen to base his defense solely on attacking the

prosecution's burden of proof beyond a reasonable doubt. However, "Although counsel may and should argue any failure of the government to carry its burden, counsel is not entitled to undermine the criminal justice system by deliberately presenting perjured testimony." Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L.Rev. 121, 144 (1985) [citing Rules of Professional Responsibility and this Court's opinion in Nix v. Whiteside, supra.] Based on the record below, suborning perjury is precisely what counsel did.

Counsel's response in the district court was that he really didn't know what the truth was when the trial started, because petitioner had initially denied any involvement to the police before he had later confessed to counsel that he had indeed been there when Ms. Trejo committed suicide, and had helped bring this about by assisting her in placing a plastic bag over her head and failing to remove it in time to save her.[6]

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[6]As discussed in the text, such a claim by counsel is untenable on the facts here. Moreover, minimum standards of effective representation would certainly require that counsel discuss his client's testimony before the trial and have a firm idea of what the defendant will say before he says it. (A. Amsterdam, 5 Trial Manual for the Defense of Criminal Cases, A.L.I., § 390, p. 162 (1989); Rieger, Client Perjury, supra, at p. 151.)

However, this claim is untenable in the face of petitioner's confession and its corroboration by independent evidence. Counsel knew for sure that his client was somehow involved.

Although there has been substantial debate about just what is necessary to "know" the client is going to commit perjury – thus bringing into play the Whiteside prohibition on a lawyer suborning perjury – all the courts and commentators who have looked at the issue have agreed that the line is crossed when the defendant actually confesses to the lawyer and independent facts support the confession. U.S. v. Long, 857 F.2d 436, 444-45 (8th Cir. 1988); In re Grievance Comm. of the U.S.D.C., D. Conn., 847 F.2d 57, 62-63 (2d Cir. 1988) [construing Code DR 7-102(B)(2)]; Hall, Handling Client Perjury after Nix v. Whiteside, 42 Mercer L.Rev. 769, 795 (1991); Commentary, When Does a Lawyer "Know" Her Client Will Commit Perjury?, 2 Georgetown Journal of Legal Ethics 579, 582 (1988) [reviewing the commentators and concluding: "It seems obvious that the 'actual knowledge' standard applies when the client has admitted facts contrary to the proposed testimony and strong corroboration exists."].

In the instant case, petitioner confessed that he was with decedent when she died, and telephone records and witness

statements established that petitioner had indeed been with her the night she disappeared. This surely amounts to "confession and corroboration", which necessarily is equivalent to "actual knowledge" of planned perjury, at least where the client is then going to take the stand and say he wasn't there at all. Yet this is precisely what the attorney advised petitioner to do. In other words, whatever legitimate debate there may be about when a lawyer "knows" perjury is about to be committed, the attorney in this case clearly crossed the line when he advised petitioner to deny all involvement after petitioner had confessed to the crime and pretrial discovery corroborated the confession. This amounted to a direct violation of the Whiteside commandment not to suborn perjury, and when the evidence at trial showed that petitioner was with the decedent when she disappeared it doomed the defense case. In other words, the lawyer here violated the commandments of this Court and sandbagged his client's defense at the same time. For both reasons, the lawyer's conduct has to be deemed "ineffective" in the constitutional sense – but the Ninth Circuit approach puts the actions of the attorney beyond the reach of justice. At the same time, because petitioner relented at the last minute and insisted on

testifying truthfully to his confession instead of falsely to an alibi, only to be met with counsel's contriving to get petitioner to agree not to testify at all, petitioner was ultimately "rewarded" for his honesty with a sentence of life-without-parole.

c. Counsel told the jury in opening statement that petitioner would testify to complete non-involvement, even though petitioner had confessed to his counsel before the trial that he had been at the scene when the decedent died and had some role in bringing about her death.

Counsel makes the remarkable claim that he "didn't know" what facts petitioner was going to testify to when the trial started – total innocence or his pre-trial confession. Even if we were to accept, for argument sake, counsel's claim in this regard, what the trial attorney did and didn't do here violates the ethical commands of the profession, the mandates of this court's decision in Nix v. Whiteside, and the lawyer's constitutional obligations as defined by the Sixth Amendment.

If counsel really didn't know what his client was going to testify to when the trial started (!), he certainly had no business committing his client in opening statement to testimony of total non-involvement – which is precisely what counsel did. At the very least counsel should have refrained

from saying *anything* in opening statement and used the time between then and the presentation of the defense case to try and convince petitioner to tell the truth and nothing but the truth. In other words, as between saying nothing and locking petitioner into a story that was belied by his client's pre-trial confession, counsel clearly should have said nothing about defendant's projected testimony in opening statement. To make matters worse, when petitioner in mid-trial decided he couldn't testify to non-involvement because his conscience wouldn't let him go through with perjury, counsel persuaded petitioner not to testify at all, but did nothing to explain to the jury why petitioner had not testified even though counsel had promised that he would. Although explaining the circumstances to the court would have, to some degree, required counsel to "fall on his sword", had he properly placed the interests of his client above his own, this would have been the only honorable course.

In sum, when counsel promised the jury in opening statement that petitioner would testify to a story counsel knew was belied by the client's pre-trial confession, counsel violated his ethical obligations and also committed an error of monumental dimensions that can only be described as

devastating to petitioner's chances of a fair trial.

d. Counsel failed to carry out any of the ethical alternatives to counselling petitioner to testify falsely.

When confronted with petitioner's confession, if counsel really believed the confession was false because petitioner had at first denied any involvement to the police, and if counsel truly could not decide which version was true, counsel should have moved to disqualify himself from the case so that new counsel could freshly examine the situation and hopefully reach a resolution that would insure that the jury was only told the truth. Nevertheless, counsel here made no effort at all to withdraw; rather, he simply sought to distance himself from the dilemma by having his co-counsel alone prepare petitioner to testify. This approach to the situation violated the ethical necessity to withdraw in lieu of presenting false testimony and committed petitioner to testifying without the benefit of previewing his testimony with the lawyer trying the case to the jury. Again, this amounted to a breach of attorney ethics and to ineffective representation at the same time.

If counsel could not satisfy himself as to whether petitioner's confession was true or false, he should have made a complete and accurate record of the developments so that

an appellate court could go back and have a contemporaneous (and therefore reasonably trustworthy) account of what had happened in order to best ensure that petitioner's rights were protected. Rather, counsel here made no record of petitioner's pre-trial confession at all, and only admitted that it had occurred during the proceedings in federal court, long after petitioner had been convicted and sentenced to life without the possibility of parole.

The requirements of ethical behavior suggested here are not merely helpful suggestions or Monday-morning quarterbacking. Rather, these are requirements for counsel's conduct in the face of potential client perjury which are mandated by the ethical standards of the profession and which were equated with the Sixth Amendment's constitutional imperatives by this Court's decision in Whiteside. See extensive discussion of these requirements in Nix v. Whiteside, supra, at pp. 176-177. See also McCall, Nix v. Whiteside: The Lawyer's Role in Response to Perjury, 13 Hastings Constitutional Law Quarterly 443-485 (1986) [setting out these same requirements from Nix v. Whiteside and tracing them to provisions in the ABA Canons of Professional Ethics, the Model Code of Professional Respon-

sibility, Proposed Criminal Justice Standard 4-7.7, the Model Rules of Professional Conduct, and constitutional decisions predating Whiteside].

e. Counsel either incompetently or falsely advised petitioner that it was "too late" to testify when petitioner insisted on testifying consistently with his pretrial confession to counsel.

Petitioner had at first gone along with his attorney's advice to testify to non-involvement, but, because of the dicates of conscience, during the latter stages of the trial decided (1) that he could not testify to total non-involvement because that was false; and (2) that he wanted to testify consistently with his confession because it was the truth. Petitioner made the latter request of his attorney after the defense had rested without his taking the stand and before the prosecution rebuttal had begun. Counsel then told petitioner that it was "too late" for him to testify because the defense had rested and asked petitioner to put it on the record that he would not be testifying. Based on his attorney's advice that it was "too late" to testify, in a brief statement made to the court at his attorney's behest prior to the close of the evidence, petitioner stated that he would not be testifying "due to the proceedings". There was no further inquiry as to what the basis for this decision was,

and no statement on the record that would begin to show that petitioner's decision not to testify was made with petitioner's informed consent. Nor was petitioner ever permitted at an evidentiary hearing to explore the impact of petitioner's counsel telling him it was "too late" to testify, even though the prosecution had not completed its rebuttal.

It was clearly erroneous for counsel to have stated to petitioner that it was "too late" to testify before the evidence phase of the case had been concluded. See, e.g., U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985) [reversible error to deny right to testify made while prosecution rebuttal in progress]. Yet this is what counsel himself admits that he did. When counsel used this erroneous advice to get petitioner to waive his right to testify on the record, the integrity of the proceedings was infected with counsel's erroneous advice. Either counsel was grossly negligent or purposefully acted to protect himself at his client's expense by putting on the record petitioner's "waiver" of the right to testify that had been obtained without his informed consent. Unfortunately, however, because of the Ninth Circuit's application of the Martinez majority rule, what counsel actually did or didn't do to procure petitioner's "waiver" is shielded from review.

This case presents a question of serious ethical violations or gross incompetence via counsel's procuring of his client's waiver of the precious right to testify on the basis of demonstrably erroneous advice and a total lack of the comprehensive discussion of the pros and cons that would have been required in all the other circuits identified in the previous section of this petition. It is legally wrong for the Ninth Circuit to shield counsel from an inquiry into procuring his client's waiver of the right to testify without informed consent, and constitutionally wrong to relegate petitioner to a life-without-parole sentence without affording him a chance to show that his "waiver" was unknowing, unintelligent, uninformed, and therefore invalid. This court should grant certiorari to expose and (if appropriate on full airing of the facts) to correct these serious wrongs.

f. Counsel failed to make any record of the questionable circumstances leading to petitioner's "waiver" of his right to testify.

The effect of the Ninth Circuit rule is to penalize the defendant for failing to make a record of his desire to testify or of the lack of informed consent for a wavier of that fundamental right. Conversely, counsel is insulated from the failure to make a record that would reveal that the attorney had not obtained

defendant's informed consent to the waiver.

Simply as a matter of professional ethics, a lawyer is instructed to make a record, out of the presence of the judge and jury, whenever a client plans to testify against the advice of counsel. McCall, The Lawyer's Role in Response to Perjury, supra, at p. 469 [referring to Criminal Justice Standard 4-7.7].

Moreover, a judicial rule which depends on a defendant to make a record of a fundamental disagreement with his attorney during trial – as the Ninth Circuit rule does – is completely at odds with the realities of the judicial system, which require that the defendant keep quiet and which impose the responsibility for making a record on counsel, not the accused. The unavoidable conflict inherent in the Martinez approach to this issue was addressed by the Third Circuit in Jordan v. Hargett, supra, 3 F.3d 310, at 314:

> *The Effect of the Failure to Object*
> Neither Jordan nor his counsel made a record ... of Jordan's desire to testify. In similar circumstances some courts have concluded that the defendant waived his right to testify. [Citation to the Ninth Circuit rule in Edwards/Martinez.] We do not believe that a defendant's failure to make a record of his desire to testify against his counsel's wishes is always fatal. Unlike many trial errors asserted in habeas proceedings, this alleged error by its very nature is one where the defendant and his lawyer are necessarily at odds with eachother. We think it unrealistic to expect that defense counsel will always

bring this attorney-client dispute to the attention of the trial court. Likewise, we believe that a rule requiring the defendant personally to make such a record is inappropriate.

The "conflict" observed by the Jordan court came to pass in spades in the instant case. Counsel saw to it that petitioner indicated for the record that he was not going to testify. However, the reasons for this decision – essentially that petitioner had refused to commit perjury, had been told erroneously that it was "too late" to testify, and had not been warned of any of the serious consequences that would follow a waiver of the right to testify – were not put on the record. Similarly, counsel failed to make a contemporaneous record of petitioner's pretrial confession; of counsel's plan to have petitioner testify directly contrary to that confession; of the reasons counsel had for committing petitioner in opening statement to testimony that was completely precluded by the defendant's pretrial confession; and that defendant had refused to testify as counsel had predicted in the opening statement because petitioner insisted that such testimony would not have been truthful. Similarly, there is no contemporaneous record of counsel's alleged reasons for refusing to allow petitioner to testify consistently with his confession; there is no record at all of counsel's reasons for telling

petitioner it was "too late" to testify when the evidence phase of the trial was still in progress; there is nothing in the record to substantiate any "downside" factors that petitioner was advised he would face by not testifying after counsel had promised he would do so in the opening; and there is no record of any attempts by counsel to withdraw or to take any other measures to assure that petitioner would testify truthfully as opposed to committing perjury.

These are extremely serious omissions from the record in any case, but are especially grave here, where the issue is whether a defendant has waived a right which even the Ninth Circuit agrees is a "fundamental and personal constitutional right". Waiver of such a right, as this Court has held on many prior occasions, must be accomplished by a showing on the record that such waiver was knowing, intelligent, and voluntary – i.e., that it was the product of informed consent.

Summary

For decades, legal scholars have urged the importance to the integrity of the judicial system of lawyers counselling clients not to commit perjury and to testify truthfully. Ethical bodies in each state are impaneled to see to it that attorneys follow these basic ethical rules. In Nix v. Whiteside, this court

made the ethical requirements prohibiting the suborning of client perjury the benchmarks of effective representation consistent with the Sixth Amendment.

Where an attorney counsels his client to commit perjury and commits him to this course in opening statement to the jury, the integrity of the justice system and the constitutional rights of the defendant are profoundly imperilled. Based on the record below which the Court of Appeals was required to accept, that is just what happened in this case, but as yet there has never been an evidentiary hearing in this matter, nor any inquiry at all into the highly disturbing actions and non-actions of counsel in this case. Rather, what counsel did and didn't do has been shielded from review by the Ninth Circuit's approach, which puts all the onus on petitioner to come forward and make a record at the trial level of what he claims is his attorney's suborning perjury, putting on a false defense, and contriving his client's "waiver" of the right to testify through false and entirely one-sided advice about what is acknowledged to be a "fundamental and personal" constitutional right.

There is only one obstacle that stands in the way of the judicial system suppressing an inquiry into the unethical and unconstitutional conduct which led to a "waiver" by petitioner

of a precious and critical right that was anything but knowing, voluntary, or intelligent: this Court's ability to grant certiorari in this matter. We urge this Court to do so as a means of upholding the honesty and integrity of the judicial system which is put directly at risk by what happened in this case.

From a legal standpoint, this case is an excellent vehicle to address the fierce conflict that is raging in the circuits regarding the proper way to handle the right to testify and what constitutes a waiver of that fundamental and personal constitutional right.

From the perspective of upholding the integrity and honor of the justice system by requiring lawyers to act responsibly and ethically in handling the problem of potential perjury, it is an equally ideal case in which these vital concerns can be aired and addressed in the open.

The public knows only what it sees of the criminal justice system, and more and more that is the Machiavellian gamesmanship and win-at-any-cost tactics of lawyers – even if the cost is the impugning the integrity of the judicial system to which lawyers (and judges) owe their livelihood, and to which the public turns for security, and justice. A legal system which continues to shroud the conduct of lawyers who

counsel perjury and who contrive "waivers" by their clients of fundamental rights as that conduct is about to be exposed is no longer a system of justice, but rather the opposite. The important ethical and legal issues raised in this case have been buried thus far in a series of ill-conceived and controversial rationalizations that are destructive of the legal system or the public it serves. To air these vitally important issues this Court must grant certiorari.

Reason #3:

Re-examining the Ninth Circuit rule regarding waiver of the right to testify will afford the opportunity to craft a universal rule that will, in the long run, cut down on collateral attacks on convictions based on a denial of the right to testify, and thereby substantially reduce the volume of federal habeas corpus litigation.

In the short run, denying certiorari in this matter will cut off further proceedings regarding this particular petitioner in this particular case. In the long run, however, granting the petition here will permit the court to fashion a nationwide rule regarding the waiver of the right to testify that will substantially reduce the flood of habeas corpus litigation in the federal courts.

As pointed out in a concurring and dissenting opinion in U.S.v. Teague, supra, 953 F.2d 1525, the absence of an adequate record below regarding the waiver of the right to

testify "opens the door for an after-the-fact swearing contest between the defendant and counsel as to whether the defendant validly waived the right to testify." Id., at p. 1544 [Clark, j., concurring and dissenting]. That is precisely what happened in the instant case below, and the Martinez rule invites such swearing contests in virtually every case in which counsel alone waives the defendant's right to testify or the defendant waives it without informed consent. This translates to a tide of habeas litigation over whether the right to testify was actually waived or not, and whether it was waived by counsel without the defendant's informed consent. In this respect, the numerous cases cited under Reason #1, supra, are merely the tip of the iceberg.

Justice Clark suggests that "a criminal defendant's waiver of his right to testify is not valid unless the record affirmatively shows that the defendant knew of this right and personally and intelligently waived it." (Id., at p. 1544.) A procedure that would require such a record to be made has been comprehensively outlined by at least one law professor and scholar. (Rieger, Client Perjury: a Proposed Resolution of the Constitutional and Ethical Issues, op.cit. supra, at p. 153.)

Although procedures such as those suggested above

would impose some burden on the trial courts, it would be no greater than that routinely required when a defendant pleads guilty and waives his right to trial altogether. In any jury case in which the defendant chooses not to testify, the court or counsel, outside the presence of the jury, should advise the defendant on the record of the personal nature of the right to testify, the principal negative consequences that accompany a waiver of the right, and the defendant's waiver on the record would then reflect his informed consent. Surely, such a colloquy with the defendant regarding the waiver of the right to testify would require infinitely less court time than extended collateral proceedings in which, long after the fact, another court must reconstruct why and how the waiver occurred and decide whether counsel or the defendant is telling the truth about those circumstances.

Because so many circuits have acknowledged that the right to testify is a fundamental constitutional right that can only be personally waived by the defendant upon a showing of informed consent, the problems arising from a "presumed" waiver of that right are not going to simply go away if the court denies certiorari here. On the contrary, every indication is that litigation over the purported waiver of this right, which was

announced by this Court in 1987 in Rock v. Arkansas, will increase exponentially so long as the lower courts are permitted to take such a waiver without satisfying the requirements of informed consent that are necessary for the waiver of any other fundamental, personal constitutional right.

By granting certiorari here, this Court can stem the flow of this extensive and costly litigation by fashioning a rule that will require that a knowing, informed, and intelligent waiver of the right to testify take place where it belongs – on the record in the trial court.

CONCLUSION

For the reasons advanced herein, the court should grant the petition for certiorari.

Dated: February 6, 1995.

RUSSELL AND RUSSELL

By: _____
KENT A. RUSSELL

Attorneys for Petitioner

APPENDIX:

Vance Nilsen v. Robert G. Borg

U.S. Court of Appeals for the Ninth Circuit
No. 94-15145
Nov. 18, 1994

FILED

NOV 18 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES OF APPEALS

FOR THE NINTH CIRCUIT

VANCE NILSEN, Petitioner-Appellant, v. ROBERT G. BORG, Warden, Respondent-Appellee.	No. 94-15145 D.C. No. CV-90-01215-DLJ **MEMORANDUM ***

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Submitted November 15, 1994**
San Francisco, California

Before: **LAY,*** PREGERSON**, and **O' SCANNLAIN,**

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

*** The honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appellant Vance Nilsen, a California state, prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition.[1] We affirm.

I

We must first address the state's claim that Nilsen has failed to exhaust his state court remedies.

A state prisoner must exhaust his state court remedies before seeking habeas relief in federal court. Picard v. Connor, 404 U.S. 270, 275 (1971); Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). In the instant case,

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1. We reject the state's claim that the district court issued an invalid certificate of probable cause, thus depriving this court of jurisdiction over Nilsen's appeal. The certificate stated, in part that it was granted "[f]or the sole purpose of facilitating petitioner's appeal, and without any expression as to the merit of the arguments raised." The state suggests that by refraining from any expression as to the merits, the district court failed to find that the petition makes a "substantial showing of a denial of [a] federal rights," as required under federal law. Barefoot v. Estelle, 463 U.S. 880, 883 (1983) (quotation omitted). As Barefoot makes clear, however, to qualify for a certificate of probable cause, a petitioner need not demonstrate a probability of success on the merits. Id. ("[O]biously, the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." (quotation omitted). Thus, the district court's refusal to pass on the merits of Nilsen's petition is of no significance to the validity of the certificate itself. Cf. Van Pilon v. Reed, 799 F.2d 1332, 1335 (9th Cir. 1986) ("[T]he scope of [appellate] review cannot be limited by a certificate of probable cause.").

however, the fact that Nilsen's claim may be unexhausted does not preclude us from resolving it. If the state fails to raise exhaustion as a defense in the proceedings below, we may, in our discretion nonetheless address the merits of the unexhausted claim if it would serve the interests of comity, federalism, and the administration of justice to do so. See Granberry v. Greer, 481 U.S. 129, 133 (1987).

Here, the state failed to raise an exhaustion defense in the district court. As discussed below, Nilsen's claim lacks merit. Because the interests of the administration of justice would be served best by addressing Nilsen's claim rather than requiring exhaustion, the exhaustion requirement will be deemed waived. Id. at 135 ("[I]f it is perfectly clear that the applicant does not raise even a colorable federal claim," the interests of justice are best served by waiving exhaustion requirement).

II

We next consider Nilsen's argument that he was denied effective assistance of counsel.

To demonstrate that counsel's assistance was ineffective, Nilsen must show, first, that counsel's performance was deficient and, second, that the deficient

performance prejudiced the defense so as to deprive Nilsen of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1983). Viewing the evidence in the light most favorable to Nilsen, as we must on an appeal from grant of summary judgement, we nonetheless conclude that Nilsen satisfies neither of Stricklan's requirements.

Nilsen's claim of deficient performance is based on counsel's alleged failure to obtain Nilsen's knowing waiver of his rights to testify. This argument is significantly undermined by the fact that Nilsen himself expressly waived his right at trial. Cf. United States v. Nohara, 3 F.3d 1239, 1243-44 (9th Cir. 1993) (claim of ineffective assistance of counsel due to denial of right to testify precluded where there is express waiver by counsel and defendant remains silent in response to such waiver).

Even were we to disregard his express waiver, Nilsen fails to demonstrate deficient performance by counsel. Despite Nilsen's assertions to the contrary, the right to testify "essentially is a strategic trial decision with constitutional implications." United States v. Joelson, 7 F.3d 174, 178 (9th Cir.) (distinguished right to testify from "personal rights that a defendant must waive explicitly, such as the right to go to trial

or plead guilty or the right to be represented by counsel"), cert. denied, 114 S. Ct. 620 (1993). Viewed in this light, the choice by counsel at trial and on appeal not to have Nilsen testify as he desired was not incompetent. As the district court explained, several factors argued in favor of counsel's decision: first, the issue of identity was open to challenge; second, there was hope that evidence connecting Nilsen to the crime might be excludable; and, finally, the victim's mother believed that the victim was still alive. In contrast, forensic evidence suggested that Nilsen's proposed testimony was untrue. These factors argued in favor of a defense based on innocence rather than one based on involvement in the crime. Ultimately, then, we cannot agree that counsel made "errors so serious that [they were] not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 2064.

Even if we were convinced that Nilsen stated a viable claim of counsel's deficiency, Nilsen fails to persuade us that such deficiency prejudiced him. Although we consider the evidence in a light favorable to Nilsen, it is still clear that a jury, faced with substantial evidence contradicting Nilsen's claim, would have found Nilsen's testimony implausible.

Counsel's refusal to allow Nilsen to testify does not create "a reasonable probability that, bur for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 2068.

As Nilsen demonstrated no genuine issues of material fact, the district court appropriately granted summary judgement to the state.

III

Finally, we conclude that the district court did not err in failing to hold an evidentiary hearing on the issue.

To be entitled to an evidentiary hearing, Nilsen must show that "(1) he has alleged fact which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the true of his allegations." Harris v. Pulley, 692 F.2d 1189, 1197 (9th Cir. 1982), rev's on other grounds, 465 U.S. 37 (1984). Accepting Nilsen's factual allegations as true, he is nonetheless incapable of demonstrating prejudice, a requirement for a showing of ineffective assistance. The district court thus correctly concluded that Nilsen was not entitled to an evidentiary hearing.

AFFIRMED.